

PUBLIC PROSECUTOR v. LIM CHEN LEN

[A.Cr.J. (Mohamed Azmi J.) February 27, 1981]

[Kuala Lumpur — Federal Territory Criminal
Appeal No. 118 of 1979]

Criminal Law and Procedure — Defence of alibi — Evidence in support — Failure to give notice in writing to Public Prosecutor 10 days before commencement of trial — “Commencement of Trial” — Meaning — Criminal Procedure Code (F.M.S. Cap. 6), ss. 399(i) & 402A(1).

Evidence — Defence of alibi — Evidence in support of — Non-compliance with s. 402A, Criminal Procedure Code (F.M.S. Cap. 6) — Effect of.

This was an appeal against the order of acquittal and discharge of the accused made on August 30, 1979 by the Magistrate at Kuala Lumpur. The accused was charged for extortion under the Penal Code. He was alleged to have extorted \$500 from one Low Tuck Seng on October 16, 1978 at 2.00 p.m. at No. 22, Jalan Walter Grenier, Kuala Lumpur. The learned Magistrate found that the prosecution had established a *prima facie* case under section 384 of the Penal Code which, if unrebutted, would warrant a conviction. The defence was one of alibi. It was contended that at the time the alleged offence was committed, the accused was in Slim Village, Perak, supervising workers in a rubber estate owned by his father and, as such, he could not have committed the offence in Kuala Lumpur. Four witnesses gave evidence in support of the alibi. One of the issues raised in the appeal was on the admissibility of evidence in support of the defence of alibi in view of the defence failure to give notice in writing to the Public Prosecutor at least ten days before the commencement of the trial as required. At the trial, objection was raised by the Prosecuting Officer on this point after the accused's wife had given her evidence-in-chief. The Magistrate overruled the prosecution's objection and admitted all evidence in support of the alibi.

Held, allowing the appeal: (1) having regard to the clear words in section 402A(1), particularly the words “shall not be admitted” and “shall have given notice”, evidence in support of a defence of alibi, which previously was admissible, is now no longer admissible in evidence unless the condition precedent as to pre-trial notice has been complied with. Like section 399(i), the provisions of section 402A(1) are evidential and not merely procedural, and unless the defence has given at least ten days written notice before the commencement of the trial, no evidence in support of a defence of alibi can be admitted in evidence. The meaning of “commencement of the trial” is the commencement of the actual trial itself and not the date when the accused was first charged in court;

(2) the requirement of pre-trial notice is mandatory and the courts here have no discretion in the matter. Whether or not the police have taken statements from the alibi witnesses in the course of their investigation is irrelevant. Without the alibi evidence, the learned Magistrate would not have found that the defence had created a doubt in the prosecution case.

[**Editorial Note:** The Malaysian provision on notice of alibi is distinguishable from Singapore section 154 of the Criminal Procedure Code (Cap. 113) which gives the High Court a discretion. See section 154(8) in particular.]

Cases referred to:-

- (1) *Ng Yee v. Public Prosecutor* [1953] M.L.J. 250.
- (2) *Chong Yik v. Public Prosecutor* [1953] M.L.J. 72.
- (3) *Wong Kok Keong v. R.* [1955] M.L.J. 13.
- (4) *Chong Peng v. Public Prosecutor* [1954] M.L.J. 39.
- (5) *Goh Tong v. Public Prosecutor* [1953] M.L.J. 251.
- (6) *R v. Hassan* [1970] 1 All E.R. 745, 748.
- (7) *R v. Sullivan* [1970] 2 All E.R. 681, 684.
- (8) *R v. Lewis* [1969] 2 Q.B. 1.

The following cases were also cited in agreement: *Jayanathan v. Public Prosecutor* [1973] 2 M.L.J. 68 and *Paul John Cooper* 69 Cr. App. Rep. 229.

CRIMINAL APPEAL.

Lamin bin Haji Mohamed Yunus (Deputy Public Prosecutor) for the appellant.

K. Chandra for the respondent.

Cur. Adv. Vult.

A **Mohamed Azmi J.:** This is an appeal by the Public Prosecutor against the order of acquittal and discharge of the accused made on August 30, 1979 by the Magistrate at Kuala Lumpur. The accused was charged for extortion under section 384 of the Penal Code. He was alleged to have extorted a sum of \$500 from one Low Tuck Seng on October 16, 1978 at about 2.00 p.m. at No. 22, Jalan Walter Grenier, off Jalan Imbi, Kuala Lumpur.

B In this case, the learned Magistrate found that the prosecution had established a *prima facie* case under section 384 of the Penal Code which, if unrebutted, would warrant a conviction. The defence was one of alibi. It was the contention of the accused that at about 2.00 p.m. on October 16, 1978, i.e. when the alleged offence was committed, he was in Slim Village, Perak, and was supervising workers in a rubber estate owned by his father and, as such, he could not have committed the offence at Kuala Lumpur. Four witnesses, Sadimin bin Sintono and Krishnan s/o Munusamy including the accused (DW1) and his wife Loke Leng How (DW2), gave evidence in support of the alibi. According to Sadimin (DW3), an estate labourer working for the accused, he saw the accused in the rubber estate at Slim Village on the morning of October 16, 1978; and at about 2.00 p.m. after finishing work, he left the rubber estate with the accused. Krishnan (DW4), a weed-killer working in the same estate, also testified that the accused was working in the estate on that material date from morning till 2.00 p.m. Loke Leng How also corroborated the accused's alibi. The learned Magistrate found that although there were discrepancies in the evidence of the accused, Sadimin and Krishnan, they were not material enough for their credibility to be impeached. She was satisfied that the defence had established the defence of alibi and that a doubt had been raised in the prosecution case, and accordingly she acquitted and discharged the accused.

C The main bone of contention in this appeal is on the issue of admissibility of evidence in support of the defence of alibi in view of the failure of the defence to give notice in writing to the Public Prosecutor at least ten days before the commencement of the trial as required by section 402A of the Criminal Procedure Code. At the trial, objection was raised by the Prosecuting Officer on this point after the accused's wife, Loke Leng How, had given her evidence-in-chief. The Magistrate overruled the prosecution's objection and admitted all evidence in support of the alibi. In dismissing the prosecution's objection, the learned Magistrate had this to say in her grounds of judgment:

D “The defence of the accused was the defence of alibi. Section 402A(1) of the Criminal Procedure Code makes it necessary for the accused to give notice of alibi to the prosecution 10 clear days before the commencement of the trial. This was, however, not done by the defence in this case. The learned Prosecuting Officer submitted that the word ‘shall’ in the section implied that it was mandatory for the notice to be given 10 clear days before the commencement of the trial but the learned defence counsel submitted that it was not mandatory. He cited the authority *Ng Yee* [1953] M.L.J. 250. In the interest of justice I drew an analogy from that case to the invoking of section 399 of the Criminal Procedure

Code. It was held that the admission as evidence of a report by a Government Chemist which was not served on an accused 10 days before the trial as required by section 399 of the Criminal Procedure Code is an irregularity and not an illegality which is curable by section 422 of the Code. As such, I allowed the defence to put up a defence of alibi."

The case of *Ng Yee v. Public Prosecutor*,⁽¹⁾ which was relied upon by the learned Magistrate, concerns the admissibility of Government Chemist Report under section 399(i) of the Criminal Procedure Code. Under the provision of subsection (1) of section 399, the report of certain Government officers specified in subsection (ii) may be given in evidence without calling the officers as witnesses, provided the prosecution have served a copy of such report to the accused *not less than ten clear days before the commencement of the trial*. But if the court or the accused requires the attendance of such witness (in case of the latter, not less than three clear days notice must be given), then the maker of the report is bound to attend court and the report cannot be admitted in evidence in the absence of the witness. In *Ng Yee's* case, it was argued that since the chemist report was not served on the appellant ten days before commencement of trial as required by section 399, the failure rendered the report inadmissible in evidence. Mathew C.J. held that the failure to serve ten days before trial was an irregularity and not an illegality and that it could be cured by section 422 of the Criminal Procedure Code. His Lordship appeared to hold the view that, although the report was wrongly admitted, the requirement of section 399(i) was merely procedural, the object of which was to enable an accused person to study the report served on him with a view to requiring the person making the report to be called as a witness. But *Ng Yee's* case is in conflict with the decision in *Chong Yik v. Public Prosecutor*⁽²⁾ and not followed in subsequent cases including *Wong Kok Keong v. R.*⁽³⁾ In *Chong Yik v. Public Prosecutor*, Storr J. held that the proviso to section 399(i) of the Criminal Procedure Code is a condition precedent and, if not complied with, the report of the Government Chemist cannot be admitted. If it is wrongly admitted in evidence, that wrongful admission is an illegality which cannot be cured under section 422 of the Criminal Procedure Code. Similarly, in *Wong Kok Keong v. R.*, Spenser Wilkinson J. in dealing with section 427(1) of the Straits Settlement Criminal Procedure Code (Cap. 21), which was *in pari materia* with section 399(i), held the view that the provisions related to evidence rather than to procedure. After perusing a number of authorities including *Ng Yee's* case, *Chong Yik's* case and *Chong Peng v. Public Prosecutor*,⁽⁴⁾ his Lordship said at page 15:

"It is clear from all these authorities that where the requisite ten days' notice of the intention to use the certificate has not been given the certificate is inadmissible. The only point upon which the decisions differ is as to the effect of the wrongful admission of such a certificate, and in all the decided cases except one, the wrongful admission has resulted in the conviction being quashed on the ground that there was no other evidence on the crucial point.

Thinking, as I do, that the provisions of section 427 are in substance provisions relating to evidence I feel constrained to follow the decisions of Storr, J. and Bellamy J."

With respect, I agree that the provision of section 399(i) of the Criminal Procedure Code relates to ad-

missibility of evidence and is not merely procedural.

Now, compared to the provision of section 399(i), section 402A of the Criminal Procedure Code is even more strongly worded to leave any ambiguity as to the intention of the legislature in introducing the provision in 1976. Section 402A provides:

- (1) Where in any criminal trial the accused seeks to put forward a defence of alibi, evidence in support thereof shall not be admitted unless the accused shall have given notice in writing thereof to the Public Prosecutor at least ten days before the commencement of the trial.
- (2) The notice required by subsection (1) shall include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi."

In my judgment, having regard to the clear words in section 402A(1), particularly the words "shall not be admitted" and "shall have given notice", evidence in support of a defence of alibi, which previously was admissible, is now no longer admissible in evidence unless the condition precedent as to pre-trial notice has been complied with. Like section 399(i), the provisions of section 402A(1) are evidential and not merely procedural, and unless the defence has given at least ten days written notice before the commencement of the trial, no evidence in support of a defence of alibi can be admitted in evidence. The meaning of "commencement of the trial" is the commencement of the actual trial itself and not the date when the accused was first charged in court. (See decision of Court of Appeal in *Goh Tong v. Public Prosecutor*⁽⁵⁾).

In the present case, the requisite notice under section 402A was admittedly given in the course of the trial during one of the adjournments. The trial commenced on May 30, 1979 and the notice was given on June 28, i.e. almost one month after trial had commenced. The failure to comply with the ten days pre-trial notice is fatal. That being the case, the learned Magistrate erred in law in overruling the prosecution's objection and in holding that the provisions of section 402A were merely procedural and that the failure to comply was a mere irregularity which could be cured under section 422 of the Criminal Procedure Code.

As to the extent of the applicability of section 402A(1), I am of the view that the words "evidence in support thereof", includes evidence of alibi given by the accused himself if he elects to give evidence on oath. Although the words "evidence in support of an alibi" have not been statutorily defined in the Criminal Procedure Code, it can be taken to mean evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission. The provision of section 402A(ii) which, *inter alia*, requires the pre-trial notice under subsection (1) to include particulars of the place where the accused claims to have been at the time of the commission of the offence, supports my view that the provision of section 402A(2) also applies to an accused person where he elects to be a witness

and gives sworn evidence.

On the submission of counsel for the respondent that the court has a discretion to waive the requirement of pre-trial notice, I regret to say that the authorities cited in support of the proposition, viz. *R. v. Hassan*,⁽⁶⁾ *R. v. Sullivan*⁽⁷⁾ and *R. v. Lewis*⁽⁸⁾ are not applicable here, as these authorities are based on section 11 of the English Criminal Justice Act, 1967, which is not *in pari materia* with our section 402A. The fact that in England the court has the last say is inherent from subsection (1) of section 11 itself which provides:

"On a trial on indictment the defendant shall not without the leave of the court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi."

The ample discretion given to English courts to grant leave is made even more clear by subsection (3) which provides:

"The court shall not refuse leave under this section if it appears to the court that the defendant was not informed in accordance with rules under section 15 of the Justices of the Peace Act 1949 (rules of procedure for magistrate's courts) of the requirements of this section."

Since the defence in the present case had failed to comply with the prerequisite of section 402A(1), the evidence given by the accused, DW2, DW3 and DW4 in support of the defence of alibi was wholly inadmissible in evidence notwithstanding the fact that statements on the alibi had been recorded by the police from two of them — Sadimin and Krishnan. In my judgment, the requirement of pre-trial notice is mandatory and the courts here have no discretion in the matter. Whether or not the police have taken statements from the alibi witnesses in the course of their investigation is irrelevant. Without the alibi evidence, the learned Magistrate would not have found that the defence had created a doubt in the prosecution case. I would therefore allow this appeal; set aside the order of discharge and acquittal. I order that a finding of guilt with conviction under the charge be recorded. Since this case has been pending since October 10, 1978, when the accused was first produced in court, I do not think a custodial sentence should be imposed, although the offence committed was a serious one. Since the accused is a first offender, a fine of \$1,000 in default six months' imprisonment is imposed.

Appeal allowed.

Solicitors: K. Chandra & Co.

A

LEE YEE SENG & ORS. v. GOLDEN STAR VIDEO BHD.

[O.C.J. (Chan J.) March 12, 1981]

[Kuala Lumpur — Originating Summons No. C 8 of 1981]

Copyright — Declaration — "Author" — Work whose author is not a citizen — Foreigner not permanent resident or resident of country — Copyright Act, 1969, ss. 2(2)(a), 5, 6(1)(a) & 7.

B

In this case the shops of all the five plaintiffs were raided by the police and the video tapes (which were thought to have infringed the copyright of the defendant) that were found on the premises were seized. Three of the directors of the 4th, 5th and 6th plaintiffs were arrested and later released on bail of \$10,000 each. Two of the directors were subsequently charged before a magistrate and their cases were pending. On January 20, 1981 the plaintiffs took out an originating summons in the Commercial Division of the High Court to secure a declaration that copyright should not subsist in a work under section 6(1)(a) of the Copyright Act, 1969 if a foreigner is not a permanent resident or resident in the country.

C

Held: (1) the word "author" has no nationality. It means exactly what it says. It is an originator, like the author of a book. It does not mean a local author or an author who is a citizen nor could it mean someone who is not a foreigner. The word "author" could not mean a resident author or a foreign author who was present in the country;

D

(2) this was not a proper case in which the discretion of the court should have been exercised to make the declaration sought for by the plaintiffs.

Cases referred to:-

E

- (1) *Jeffreys v. Boosey* (1854) 4 H.L.C. 815; 10 E.R. 681.
- (2) *Routledge v. Low* (1868) L.R. 3 H.L. 100.
- (3) *Thompson v. Gould and Co.* [1910] A.C. 409, 420.
- (4) *Vickers, Sons & Maxim v. Evans* [1910] A.C. 444, 445.
- (5) *Falcon v. Famous Players Film Co.* [1926] 1 K.B. 393, 403.
- (6) *Bodley Head v. Flegon* [1972] 1 W.L.R. 680.
- (7) *Imperial Tobacco Ltd. v. Attorney-General* [1980] 2 W.L.R. 466; [1980] 1 All E.R. 866.

F

ORIGINATING SUMMONS.

Wong Chong Wah and *Lee Tat Boon* for the plaintiffs.

M. Shankar and *S.F. Wong* for the defendant.

G

Mah Weng Kwai and *Muhammad Shafee* for the Attorney-General as *amicus curiae*.

Cur. Adv. Vult.

Chan J.: On January 20, 1981, the plaintiffs took out an originating summons in the Commercial Division of the High Court to secure a declaration that copyright shall not subsist in a work under section 6(1)(a) of the Copyright Act, 1969 if the author is not a citizen of Malaysia or, if a foreigner, is not a permanent resident or resident in this country.

Copyright

By section 6(1) of the Copyright Act, 1969:

I

"Copyright shall be conferred by this section on every work which is eligible for copyright and which —

- (a) being a literary, musical or artistic work or cinematograph film is first published in Malaysia."

Section 2(2)(a) of the Act provides that

"a work shall be deemed to have been published if a copy or copies thereof have been made available with the consent of the author in a manner sufficient to satisfy the reasonable requirements of the public."